Before the
Administrative Hearing Commission
State of Missouri

DIRECTOR OF DEPARTMENT OF PUBLIC SAFETY, Petitioner, vs. CARLO L. RANDALL, Respondent.	)	No. 13-1157 PO

ORDER GRANTING SUMMARY DECISION IN PART

Carlo L. Randall is subject to discipline because he committed a criminal offense.

Procedure

On June 26, 2013, the Director of the Department of Public Safety ("the Director") filed a complaint seeking to discipline Randall. Randall was served with the complaint and our notice of complaint/notice of hearing on June 28, 2013. He did not file an answer.

The Director filed a motion for summary decision on October 7, 2013. We notified Randall that he should file any response by October 22, 2013, but he filed nothing.

By failing to answer or otherwise respond to the complaint, Randall has admitted the allegations contained therein. 1 CSR 15-3.380(7)(C)1.[1] By failing to respond to the motion for

[1] All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

summary decision, he has also failed to raise a genuine issue as to the facts the Director established in his motion. 1 CSR 15-3.446(6)(B).

Accordingly, the findings of fact are based on the allegations contained in the complaint and the unanswered request for admissions served on Randall on August 14, 2013. Under Supreme Court Rule 59.01, the failure to answer a request for admissions establishes the matters asserted in the request, and no further proof is required. *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App., W.D. 1985). Such a deemed admission can establish any fact or any application of law to fact. *Linde v. Kilbourne*, 543 S.W.2d 543, 545-46 (Mo. App., W.D. 1976). That rule applies to all parties, including those acting *pro se. Research Hosp. v. Williams*, 651 S.W.2d 667, 669 (Mo. App., W.D. 1983). Section 536.073[2] and 1 CSR 15-3.420(1) apply that rule to this case. Therefore, the following findings of fact are undisputed.

Findings of Fact

1. Randall holds a peace officer license issued by the Director that was current and active at all relevant times.

2. Randall was an officer with the Maplewood, Missouri, police department between January 1, 2011, and August 12, 2011.

3. For a period of about seven months preceding August 11, 2011, Randall regularly patronized a social club run out of a residence in Bel-Ridge, Missouri. Sometimes Randall was present at the social club in his uniform.

4. Randall was aware that the social club sold intoxicating liquor to its patrons without a license to do so, in violation of § 311.050, RSMo 2000.

[2]RSMo 2000. Statutory references, unless otherwise noted, are to RSMo Supp. 2012.

5. Randall was also aware that the social club constituted an "adult cabaret," as defined in § 573.500(1), RSMo 2000, and that persons less than nineteen years of age were permitted to dance at the cabaret in violation of § 573.509.

6. Randall was also aware that the social club constituted a "sexually oriented business" as defined in § 573.528(15); that dancers in the club knowingly appeared nude and semi-nude, not on a fixed stage at least six feet from all patrons and eighteen inches from the floor; that employees appearing in a semi-nude condition knowingly touched patrons or their clothing; that persons knowingly sold, used or consumed alcoholic beverages on the premises; and that persons knowingly allowed persons under the age of eighteen on the premises, in violation of § 573.531.

7. Randall was also aware that prostitution occurred at the social club in violation of § 567.030.

8. Randall observed individuals on the premises of the social club in possession of controlled substances in violation of § 195.202.

9. Randall patronized prostitution at the premises of the social club on multiple occasions in violation of § 567.030.

Conclusions of Law

We have jurisdiction to hear this case. Section 590.080.2. The Director has the burden of proving by a preponderance of the evidence that Randall has committed an act for which the law allows discipline. *See Kerwin v. Mo. Dental Bd*., 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012)(dental licensing board demonstrates "cause" to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that "'the fact to be proved [is] more probable than not.'" *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

The Director alleges that there is cause for discipline under § 590.080:

> 1. The director shall have cause to discipline any peace officer licensee who:
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> * * *
>
> (2) Has committed any criminal offense, whether or not a criminal charge has been filed;
>
> (3) Has committed any act while on active duty or under color of law that involves moral turpitude or a reckless disregard for the safety of the public or any person.

Subdivision (2) – Criminal Offense

Randall admitted that he patronized prostitution at the social club. Patronizing prostitution is a crime. § 567.030. Randall committed a criminal offense and is therefore subject to discipline under § 590.080.1(2).

Subdivision (3) – Moral Turpitude

The Director also argues that Randall may be disciplined under § 590.080.1(3) for committing an act under color of law that involves moral turpitude.[3] As defined by a court when construing the term in the context of 42 U.S.C. § 1983:

> "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" . . . At the same time, however, the Supreme Court has made clear that even the "[m]isuse of power" possessed by virtue of state law is action taken "under color of state law." . . . Thus, "under 'color' of law" means "under 'pretense' of law," and "[a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority *or overstep it.*"

Dossett v. First State Bank, 399 F.3d 940, 949 (8th Cir. 2005).

[3] There is no evidence in the record that Randall was on active duty while at the social club.

There is no suggestion from this definition that merely wearing a uniform is tantamount to acting under color of law, and the Director cites no such authority. Instead, he argues:

> Anytime an officer appears publically in uniform the officer is acting under the color of law; the officer is presenting the appearance of a right, authority, or office. And by patronizing the club while in uniform he tacitly approved or endorsed the activities occurring there. His endorsing of the unlawful activities is contrary to justice, honesty, modesty or good morals, and therefore, constitutes moral turpitude. *In re Duncan,* 844 S.W.3d 443, 444 (Mo. 1993). It also demonstrated a reckless disregard for the safety of several individuals, particularly underage performers at the cabaret. Respondent's endorsement of the unlawful activities enabled the owners to exploit the performers, and indicated to the performers that legal redress was not likely available to them.[4]

We have found no Missouri case that directly addresses the issue of whether, as a matter of law, an officer who wears a uniform but otherwise asserts no authority as a peace officer acts under color of law. In *State v. Woods,* 790 S.W.2d 253 (Mo.App. S.D., 1990), the court addressed the issue of whether an off-duty policeman was automatically acting in an official capacity when he discovered illegal drugs. In that case, the court quoted approvingly from *State v. Pearson,* 514 P.2d 884, 886 (Or. App. 1973): "[O]fficial involvement is not measured by the primary occupation of the actor, but by the *capacity* in which he acts at the time in question." (Emphasis in original).

Courts have also stated that whether a police officer is off duty or out of uniform is not controlling in determining whether the officer's conduct was under color of law. "It is the nature of the act performed, not the clothing of the actor or even the status of being on or off duty, which determines whether the officer has acted under color of law." *Pickard v. City of Girard,* 70 F. Supp. 2d 802, 805 (N.D. Ohio 1999) (citations omitted). The court set forth two circumstances where an off-duty police officer's actions are "state actions" because they are

[4] Director's motion at 5.

performed under color of law: (1) when a police officer undertakes purely private action while invoking his authority as a policy officer, or as a result of his role as a police officer; and (2) when an off-duty police officer undertakes an official duty. *Id.* at 806.

In determining the nature of the act performed, the courts consider such factors as displaying a badge and uniform, or making "other assertions of police authority." *In re Albert S.*, 664 A.2d 476, 483 (Md. App., 1995). In that case, the court found that an off-duty police officer was acting under color of police authority when he stopped an automobile while driving a marked police cruiser, despite the fact that he was not in uniform and did not identify himself as a police officer. *Id.* at 484. S*ee Brewer v. Trimble*, 902 S.W.2d 342, 344 (Mo. App., S.D. 1995) (police officer outside his jurisdiction used his police authority and police car to pursue and stop speeding vehicle).

We cannot determine that Randall acted under color of law merely by being at the social club while in uniform – we have no other evidence in the record at this time that he made any "other assertions of police authority." Therefore, we do not address whether Randall's actions constitute moral turpitude. We deny the Director's motion as to cause for discipline under § 590.080.1(3).

Summary

We find cause to discipline Randall's peace officer license under § 590.080.1(2), but not under (3). The Director shall inform us no later than November 5, 2013, whether he wishes to proceed to hearing on the latter cause for discipline.

SO ORDERED on October 29, 2013.

\s\ Karen A. Winn
KAREN A. WINN
Commissioner